Supreme Court, U.S.
FILED

10-12 JUN 23 2010

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

JO CAROL ALFORD, Individually, and as Executrix of the Estate of Arthur Randall Alford, Deceased,

Petitioner,

v.

MISSISSIPPI DIVISION OF MEDICAID,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

---

PETITION FOR A WRIT OF CERTIORARI

RONALD CRAIG MORTON
Counsel of Record for the Petitioner
132 Fairmont Street, Suite A
Clinton, Mississippi 39056
(601) 925-9797
rmorton@mortonlaw.com

QUESTION PRESENTED

Whether the provisions of the Medicare Catastrophic Coverage Act of 1988 designed to ensure that community spouses of Medicaid applicants have sufficient income and resources to live independently and with dignity that require state Medicaid agencies to recognize orders of increased spousal support, give trial courts independent jurisdiction to enter such orders before benefits are applied for and in the absence of exhausted state administrative remedies?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....vi

CITATION OF REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE.....1

BASIS FOR SUPREME COURT JURISDICITON...1

STATUTES AND REGULATIONS INVOLVED IN THE CASE.....1

STATEMENT OF THE CASE.....1

Introduction.....1

A. Federal Statutory and Regulatory Background.....3

1. The Jurisdictional Problem Regarding an Increase of the MMMNA and CSRA in General.....3

2. Court Ordered Support under 42 U.S.C. §§ 1396r-5(d)(5) and 1396r-5(f)(3).....6

3. Notice and Fair Hearing Under 42 U.S.C. § 1396r-5(e).....7

B. Procedural History.....7

1. The Chancery Court of Madison County, Mississippi.....7

2. Supreme Court of Mississippi.....8

ARGUMENT.....10

A. Certiorari is Appropriate Because a Substantial Conflict Exists Between *Alford* and Decisions of Several Other States in Interpretation and Application of the Same Federal Law.....10

1. The *Alford* Decision Conflicts with Decisions of the Courts of the District of Columbia, New Jersey, and Tennessee that Directly Addressed the Federal Spousal-Impoverishment Provisions.....11

a. *M.E.F. v. A.B.F.* (Superior Court of New Jersey).....11

b. *In re Estate of Tyler* (Superior Court of the District of Columbia).....12

c. *Blumberg v. Tennessee* (Court of Appeals of Tennessee).....13

B. Certiorari is Appropriate Because *Alford* Conflicts with this Court's Decision in *Wisconsin Dep't of Health & Human Servs. V. Blumer*, Mississippi Div. of Medicaid's Own Rules, the Dep't of Health & Human Service's

Publications, and the Court's Own Precedent.....14

1. The *Alford* Decision Directly Conflicts With This Court's Decision in *Wisconsin Dep't of Health & Family Services v. Blumer*.....14

2. The Division's Own Rules and Publications by the Department of Health and Human Services Conflict With the *Alford* Decision.....15

3. The *Alford* Decision Directly Conflicts With Numerous Supreme Court of Mississippi Decisions.....18

C. Certiorari is Appropriate Because this Case Involves an Important Question of Federal Law that Has Not Been, But Should Be, Settled By This Court.....19

1. This Case Presents A Question Of Significant National Importance.....21

2. The *Alford* Decision Misinterpreted Federal Medicaid Law Regarding the Prevention of Spousal Impoverishment, Thereby Minimizing A Key Purpose Of Federal Medicaid Law.....23

CONCLUSION.....24

APPENDIX.....App. 1

42 U.S.C. § 1396r-5(d)(5) (2010).....App. 1

42 U.S.C. § 1396r-5(e) (2010).....App. 1

42 U.S.C. § 1396r-5(f)(3) (2010).....App. 3

Alford v. Miss. Div. of Medicaid, 30 So. 3d 1212 (Miss. 2010).....App. 4

Order and J. of Supp., *Alford v. Alford*, No. 2008-933-B (Ch. Ct. of Madison County, Miss. Dec. 2, 2008).....App. 24

Transcript of Proceedings, *Alford v. Alford*, No. 2008-933-B (Ch. Ct. of Madison County, Miss. (2008)).....App. 26

Centers for Medicare & Medicaid Services: Spousal Impoverishment.....App. 33

Mississippi Division of Medicaid Eligibility Manual, Volume III, Section 1, 9210....App. 35

TABLE OF AUTHORITIES

FEDERAL CASES:

Batterton v. Francis, 432 U.S. 416 (1977).....15

Dunn v. Blumstein, 405 U.S. 330 (1972).....20

Erlenbaugh v. U.S., 409 U.S. 239 (1972).....24

Harris v. McRae, 448 U.S. 297 (1980).....15

Moore v. Ogilvie, 394 U.S. 814 (1969).....20

Rosario v. Rockefeller, 410 U.S. 752 (1973).....20

Schweiker v. Gray Panthers, 453 U.S. 473 (1981)...14

Storer v. Brown, 415 U.S. 724 (1974).....20

Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115 (1974).....19, 20

Wis. Dep't of Health & Family Servs. v. Blumer (534 U.S. 473 (2002).....4, 14, 15

STATE CASES:

Alford v. Miss. Div. of Medicaid, 30 So. 3d 1212 (Miss. 2010).....*passim*

Amos v. Estate of Amos, 267 S.W.3d 761 (Mo. Ct. App. ED 2008).....5, 10

Ark. Dep't of Health & Human Servs. v. Smith, 262 S.W.3d 167 (Ark. 2007).....5

Hood v. Miss. Dep't of Wildlife Conservation, 571 So. 2d 263 (Miss. 1990).....19

M.E.F. v. A.B.F., 393 N.J. Super. 543 (2007).5, 11, 12

Miss. Bureau of Narcotics v. Stacy, 817 So. 2d 523 (Miss. 2002).....18

PERS v. Hawkins, 781 So. 2d 263 (Miss. 2001).19, 22

PERS v. Ross, 829 So. 2d 1238 (Miss. 2002).....18

UNPUBLISHED CASES:

Alford v. Alford, No. 2008-933-B (Ch. Ct. of Madison County, Miss. 2008).....1, 7, 8

Blumberg v. Tenn. Dep't of Human Servs., 2000 WL 1586454 (Tenn. Ct. App. 2000).....5, 13, 14

Huynh v. King, 2008 WL 4547628 (Mo. Ct. App. WD 2008).....5

In re Estate of Tyler, 2002 WL 1274125 (D.C. Super. 2002).....5, 12, 13

FEDERAL STATUTES:

28 U.S.C. § 1331 (2010).....24

28 U.S.C. § 1332 (2010).....24

28 U.S.C. § 1257(a) (2010).....1

28 U.S.C. § 2101(c) (2010).....1

42 U.S.C. § 1396r-5(d)(5) (2010).....*passim*

42 U.S.C. § 1396r-5(e) (2010)..... 1, 6, 7, 8, 9

42 U.S.C. § 1396r-5(f)(3) (2010).....1, 6

STATE STATUTES:

Miss. Code Ann. § 43-13-116 (2010).....22

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 13.3.....1

OTHER AUTHORITIES:

Centers for Medicare & Medicaid Services: Spousal Impoverishment, http://www.cms.hss.gov, last accessed on Feb. 2, 2009.....16, 17

Elizabeth A. Weeks, COOPERATIVE FEDERALISM & HEALTHCARE REFORM: THE MEDICARE PART D 'CLAWBACK' EXAMPLE, 1 STLUJHLP 79 (2007).....21

H.R. REP. NO. 100-105(II) (1987), *reprinted in* 1988 U.S.C.C.A.N. 857.....4, 11, 12

KAISER COMM'N ON MEDICAID & THE UNINSURED, OPTIMIZING MEDICAID ENROLLMENT: PERSPECTIVES ON STRENGTHENING MEDICAID'S REACH UNDER HEALTH CARE REFORM (April 2010).....19

Miss. Div. of Medicaid Eligibility Manual, Volume III, Section 1, 9210.....7, 17

CITATION OF REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

Alford v. Miss. Div. of Medicaid, 30 So. 3d 1212 (Miss. 2010).

Order and J. of Supp., *Alford v. Alford*, No. 2008-933-B (Ch. Ct. of Madison County, Miss. Dec. 2, 2008).

BASIS FOR SUPREME COURT JURISDICTION

The Mississippi Supreme Court entered its judgment on March 25, 2010. App. 4. Petitioner Jo Carol Alford seeks review of that judgment on a writ of certiorari. The present petition is timely filed pursuant to 28 U.S.C. § 2101(c) and Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the final judgment rendered by the highest court of a State in which a decision could be had where any right or privilege is claimed under the statutes of the United States.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 1396r-5(d)(5) (2010), App. 1
42 U.S.C. § 1396r-5(e) (2010), App. 1
42 U.S.C. § 1396r-5(f)(3) (2010), App. 3

STATEMENT OF THE CASE

Introduction

Arthur Randall Alford was diagnosed with multiple sclerosis in 1986. App. 28. His health began rapidly deteriorating in January of 2008. *Id.* A blood clot, severe bladder infection, staff infection, and hydrocephalus, combined with the rapid progression of his multiple sclerosis, caused Mr. Alford to lose and never regain the ability to walk. App. 28-29. He moved back and forth between hospitals and rehabilitation facilities three times, and after June 4th he was continually under institutional care. *Id.*

Mrs. Alford, his wife of twelve (12) years was a relatively young fifty-eight (58), but had not worked for twenty-five (25) years and has no specialized training in any type of employment. App. 27-28. Her remaining life expectancy at the time of filing suit was twenty-five (25) years, but without an exception to Mississippi's permitted Medicaid resource and income allowance for community spouses, she would have become destitute within only five years of Mr. Alford's admittance into a nursing home. App. 30. Since the state's default maximum asset and income limits would have resulted in her own impoverishment in only a matter of sixty months following her husband's Medicaid enrollment, Mrs. Alford sought a court ordered increase in the resource and income allowances pursuant to 42 U.S.C. § 1396r-5(d)(5). App. 26, 30. Even if the Chancellor had granted her requested increase from the maximum amount allowed by the Mississippi Division of Medicaid (Division) through the community spouse resource allowance (CSRA) to the entirety of their entire joint assets, she would

still have run out of money within only twelve (12) years of his nursing home entry. App. 30.

Mrs. Alford argued that 42 U.S.C. § 1396r-5(d)(5) expressly granted the chancery court the authority to grant this increase. App. 26. Mrs. Alford further argued that an exhaustion of administrative remedies would be futile since, under state regulation, the Division is prohibited from awarding an amount above the federal maximum. App. 5. The Division contended that it had sole authority and jurisdiction to consider an increase, and the chancery court's only action, therefore, could be a review of the Division's final decision. App. 27.

The chancery court held that 42 U.S.C. § 1396r-5(d)(5) did not grant it the necessary jurisdiction to award Mrs. Alford the requested relief. App. 25. Mrs. Alford appealed the trial court's decision but shortly thereafter Mr. Alford died. App. 6. The Supreme Court of Mississippi nonetheless continued to hear the case, substituting Mr. Alford's estate as the interested party, under an exception to the mootness doctrine. App. 7. The Mississippi Supreme Court affirmed the chancery court's holding. App. 23.

A. Federal Statutory and Regulatory Background

1. The Jurisdictional Problem Regarding an Increase of the MMMNA and CSRA in General

The Medicare Catastrophic Coverage Act of 1988 (MCCA) was enacted to "protect the elderly and

disabled population from the financial disaster caused by catastrophic health care expenditures," and § 214 of the MCCA prevents community spouses from becoming destitute in order for their spouse to qualify for public benefits. 1988 U.S.C.C.A.N. 857, 888-92 (discussing the protection of income and resources of couples for maintenance of the community spouse and declaring "The [MCCA] ... end[s] spousal impoverishment."); *see Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473, 480 (2002). Sound policy and fiscal considerations underlie Congressional intent; one of the MCCA's stated purposes is to "substantially reduce the required cost sharing under Medicare." *Id.* at 858. Additionally, the drafters of the MCCA were troubled by the great variance in resource levels among states, and therefore "establishe[d] a uniform national spousal protection policy that applies in all States." *Id.* at 891-92 (citing and including an AARP study highlighting the vast discrepancy in CSRA from state to state).

The elimination of spousal impoverishment is accomplished primarily through two independent mechanisms. First, the well spouse, called the community spouse, is permitted to retain marital assets up to the limits of the "Community Spouse Resource Allowance" (CSRA). Additionally, the community spouse is also permitted to retain income of the institutionalized spouse up to the limits of the "Minimum Monthly Maintenance Needs Allowance" (MMMNA). Each state has maximum CSRA and MMMNA limits within the parameters of federal law. However, the MCCA also permits increases of these limits under appropriate circumstances.

Unfortunately, Congress' attempt to create greater uniformity between states in the area of spousal impoverishment is being frustrated, as states are not uniformly applying the MCCA's provision granting courts jurisdiction to set the MMMNA and CSRA amounts. Instead, States are currently split on whether 42 U.S.C. § 1396-r5 gives a trial court original jurisdiction to increase these qualification limits, or whether one must first exhaust all administrative remedies before petitioning a court to determine the MMMNA or CSRA amount.

The Arkansas Supreme Court and Missouri Court of Appeals have held that administrative remedies must be exhausted first. *See Ark. Dep't of Health & Human Services v. Smith*, 262 S.W.3d 167 (Ark. 2007); *Amos v. Estate of Amos*, 267 S.W.3d 761 (Mo. Ct. App. ED 2008); *and Huynh v. King*, 2008 WL 4547628 (Mo. Ct. App. WD 2008).

Conversely, the New Jersey Superior Court, Superior Court of the District of Columbia, and Tennessee Court of Appeals have held that exhaustion of administrative remedies is not a prerequisite to petitioning a court for an increase in MMMNA or CSRA amounts. *See M.E.F. v. A.B.F.*, 393 N.J. Super. 543 (2007); *In re Estate of Tyler*, 2002 WL 1274125 (D.C. Super. 2002); *and Blumberg v. Tenn. Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000). Those states hold that federal law creates two independent avenues to obtain an increase – court order or administrative appeal. The split is a result of reliance on either 42 U.S.C. § 1396r-5(d)(5), which allows the MMMNA and/or CSRA amounts to be set by court order, or the application of the exhaustion doctrine, which

requires that Medicaid's remedies be exhausted first, since 42 U.S.C. § 1396r-5(e)(2) allows a fair hearing to review the MMMNA and/or CSRA amounts if either spouse is dissatisfied with the determination. There is nothing in the language of the Act suggesting that exhaustion of administrative remedies is a pre-requisite for petitioning a court under 42 U.S.C. § 1396r-5(d)(5). To the contrary, the actual language of the statute envisions that the court's order would be in place prior to making an original application for Medicaid benefits, not following an appeal of those benefits. In addition, the administrative regulations of some states, such as Mississippi, require a court order to increase MMMNA and/or CSRA amounts above the federal maximum, despite their insistence that parties must first seek an increase from the agency, rendering the exhaustion of administrative remedies futile.

2. Court Ordered Support under 42 U.S.C. §§ 1396r-5(d)(5) and 1396r-5(f)(3)

42 U.S.C. § 1396r-5(d)(5) unambiguously provides that, "[i]f a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered." 42 U.S.C. § 1396r-5(d)(5). While administrative remedies are set forth in other subsections, 42 U.S.C. § 1396r-5(d)(5) does not state those remedies must be exhausted before its judicial remedy may be sought. 42 U.S.C. § 1396r-5(f)(3) provides that, "[i]f a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of

this title shall not apply to amounts of resources transferred pursuant to such order . . . ."

3. Notice and Fair Hearing Under 42 U.S.C. § 1396r-5(e)

After eligibility for medical assistance is determined, or if either spouse requests it, states must notify the requestor of the amount of the allowance, how the allowance was computed, and of the right to a fair hearing "respecting ownership or availability of income or resources." 42 U.S.C. § 1396r-5(e)(1). If the dissatisfied spouse establishes at the fair hearing that the MMMNA and/or CSRA amounts are inadequate, an adequate amount shall be substituted. 42 U.S.C. § 1396r-5(e)(2). Often, however, an adequate amount cannot be substituted, under the administrative rules of the State in which one resides. For example, Mississippi's Div. of Medicaid manual states that "[i]n order for a [community spouse] to receive a share larger than the federal maximum, a court order would be required granting the [community spouse] a greater share of total resources[.]" Mississippi Division of Medicaid Eligibility Manual, Volume III, Section 1, 9210, App. 35.

B. Procedural History

1. The Chancery Court of Madison County, Mississippi

Mrs. Alford filed her Petition to Increase CSRA and the MMMNA on September 26, 2008. In an Order filed on December 02, 2008, the court held "that it does not have subject matter jurisdiction

pursuant to 42 USC §1396r-5, . . . and to the extent that the Petitioner seeks relief arising exclusively from jurisdiction premised on such federal law, such . . . relief is denied, base solely on this Court's lack of subject matter jurisdiction to award such . . . relief." App. 25. At trial, the Chancellor stated: "You're asking me to, as a court of first impression, apply Tennessee and New Jersey like proceedings and assert a federal statute in a state court. I do not believe that is what the court order of what you are citing was meant to be." App. 31-32.[1]

2. Supreme Court of Mississippi

The Mississippi Supreme Court affirmed the chancery court, finding "the opinions of the Arkansas Supreme Court and the Missouri Court of Appeals provide a more compelling interpretation of the spousal impoverishment provisions." App. 21. The court first discussed Tennessee, New Jersey, and the District of Columbia's interpretation of the statute in question, which is that the statute provides two, alternative mechanisms for increasing the CSRA and/or the MMMNA. App. 15-18. The first path is to seek a court order prior to filing a Medicaid application; the second alternative path is to file a Medicaid application and seek an increase through the fair hearing process under 42 U.S.C. § 1396r-5(e). App. 16. According to those courts, federal law creates these independent alternative routes to obtain an increase. *Id.* Specifically, the court cited the District of Columbia, which, after looking at the express language of 42 U.S.C. § 1396r-5, declared

---

[1] The Chancellor did state, however, that she welcomed an appeal and clarification of the law. App. 32.

that "[t]here can be no doubt . . . that Congress intended that spousal support orders for income not only be taken into account [by the agency] in calculating income allowances, but also bypass the standard Medicaid rules regarding resources and income." App. 17-18. Thus, the D.C. court concluded that "court orders 'preempt the spousal resource and income allowances' under the MCCA." App. 18.

The Mississippi court ultimately found Arkansas' and Missouri's approach more persuasive. App. 21. The Arkansas and Missouri opinions conclude that 42 U.S.C. § 1396r-5(d)(5) does not confer pre-filing determination authority to trial courts, concluding instead that a reading of the statute as a whole "makes it clear that any allocation of a couple's assets can only occur after a determination of Medicaid eligibility has been made." App. 18. Those courts also reason that administrative agencies are better equipped to "determine and analyze legal issues affecting their agencies," and 42 U.S.C. § 1396r-5(d)(5) does not specifically reference CSRA or MMMNA, but rather generally refers to "an order of spousal support." App. 20.

The Mississippi court gave deference to the fact that administrative review and revision is specifically provided for in 42 U.S.C. § 1396r-5(e). App. 23. Additionally, the court stated that the doctrine of primary jurisdiction applies, even though the Division's own rules require an ultimate court order, because the agency rule cited by Mrs. Alford only applies to "countable resources" instead of specifically mentioning the MMMNA. App. 21-22. Thus, the court concluded that the doctrines of

exhaustion of administrative remedies and primary jurisdiction render 42 U.S.C. § 1396r-5(d)(5) "insufficient to confer upon the courts parallel jurisdiction to increase the MMMNA and CSRA." App. 23.

ARGUMENT

A. Certiorari is Appropriate Because a Substantial Conflict Exists Between *Alford* and Decisions of Several Other States in Interpretation and Application of the Same Federal Law

The *Alford* decision directly conflicts with decisions of courts of the District of Columbia, New Jersey, and Tennessee, all of which held that 42 U.S.C. § 1396r-(d)(5)(d) grants trial courts the original subject matter jurisdiction to increase CSRA and MMMNA amounts as an alternative to administrative remedies otherwise provided. The Supreme Court of Arkansas and the Missouri Court of Appeals, however, have ruled in a manner consistent with *Alford*. Due to this conflict over an area of federal law that significantly impacts every state, this often-litigated and critically important issue is ripe for review by this Court. This is especially true in the spousal-impoverishment area, where "[u]niformity of result is critical." *Amos*, 267 S.W.3d at 764.

1. The *Alford* Decision Conflicts with Decisions of Courts of the District of Columbia, New Jersey, and Tennessee that Directly Addressed the Federal Spousal-Impoverishment Provisions

a. *M.E.F. v. A.B.F.* (Superior Court of New Jersey)

In *M.E.F. v. A.B.F.*, much like *Alford*, a spouse's default asset allowance was inadequate under the circumstances and, rather than pursuing the administrative remedy of a fair hearing, she petitioned a court for a resource increase. *M.E.F.*, 925 A.2d at 15. There, that state's division actually conceded "the Act provides alternative routes for obtaining an increased MMMNA." *Id.* The court relied heavily upon the Act's legislative history in determining the spouse could obtain an increase through a court order. *Id.* at 17-18 (citing House Report No. 100-105(II), *reprinted in* 1988 *U.S.C.C.A.N.* 857 ("inadequate" maintenance needs levels for community spouses have, "[i]n some cases, . . . forced community spouses, in desperation, to sue their husbands for support . . . . [The Act] would end spousal impoverishment" and "assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity.")). Of particular importance in the case *sub judice*, that court pointed out that:

> [t]he Committee recognizes that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affecting a particular community spouse. *The bill therefore provides that, if a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance*

> *must be at least as great as the amount of the income ordered to be paid.*

Id. at 18 (quoting 1988 *U.S.C.C.A.N.* at 895-96) (emphasis added).

Furthermore, the court reasoned, the Act's use of past tense suggests the court-ordered support provision can only be obtained prior to a determination of Medicaid eligibility, which is "consistent with a Congressional concern, expressed in the context of a discussion of the . . . protection of income for the community spouse, and transfer of resources, that spouses not be worse off under proposed legislation than they were under existing law, which in some instances recognized spousal support orders." *Id.* at 19. The *M.E.F.* court also recognized that the Act "merely recognizes the effect of an order of support if it has been previously obtained." *Id.* Additionally, it makes sense that the judicial remedy provided be utilized pre-filing (especially in states such as Mississippi that ultimately require a court order for an increase, anyway), since holding otherwise would foster forum shopping and render the fair hearing process meaningless. *Id.* at 21. The court concluded that, while in some cases it may be better for a trial court to recognize the state agency's primary jurisdiction, "[w]e leave the choice whether to do so in individual cases to the sound discretion of the trial courts."

b. *In re Estate of Tyler* (Superior Court of the District of Columbia)

In *In re Estate of Tyler*, the plaintiff filed her petition to increase funds after applying for Medicaid but prior to Medicaid's determination of the spouse's

eligibility. *In re Estate of Tyler*, 2002 WL 1274125 *1, *1-*2 (D.C.Super. May 30, 2002). Under the particular facts of that case the court denied the petition, but the court did explicitly endorse the position that the statute unambiguously allows a determination of the amount of resources to be kept even when administrative remedies have not been exhausted:

> There can be no doubt from the express language of the Statute, as enacted, that Congress intended that spousal support orders for income not only be taken into account in calculating income allowances, but also bypass the standard Medicaid rules regarding resources and income. A reading of the plain language of the Medicaid Statute compels the conclusion that Congress intended that court orders transferring resources and income between spouses, if more favorable to the community spouse, preempt the spousal resource and income allowances calculated by the Program. *Id.* at *3, *6 (internal citations omitted).

c. *Blumberg v. Tenn.* (Court of Appeals of Tennessee)

In *Blumberg v. Tenn.*, the plaintiff obtained a court order increasing his MMMNA amount and thereafter his wife applied for Medicaid. *Blumberg v. Tenn.*, 2000 WL 1586454 * 1 (Tenn. Ct. App. Oct. 25, 2000). Medicaid approved his wife, but the increase in his income allocation was denied. *Id.* Drawing heavily upon the language in 42 U.S.C. § 1396r-5(d)(5), the court found that, "[i]f a community spouse seeks an increase in [MMMNA], the Act sets

out two different and independent avenues of relief that can be followed in setting the increase." *Id.* at *2. Thus, the plaintiff's election of the judicial route as provided in 42 U.S.C. § 1396r-5(d)(5) was "within the ambit of the statute." *Id.* at *3.

B. Certiorari is Appropriate Because *Alford* Conflicts with this Court's Decision in *Wisconsin Dep't of Health & Family Servs. v. Blumer*, Mississippi Div. of Medicaid's Own Rules, the Dep't of Health & Human Service's Publications, and the Court's Own Precedent

1. The *Alford* Decision Directly Conflicts With This Court's Decision in *Wisconsin Dep't of Health & Family Services v. Blumer*

In *Wisconsin Dep't of Health & Family Services v. Blumer*, this Court reaffirmed its position that "'Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance' *within boundaries set by the Medicaid statute* and the Secretary of Health and Human Services." *Wisconsin Dep't of Health & Human Services v. Blumer*, 534 U.S. 473, 479 (2002) (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981)) (emphasis added). The Court also implicitly recognized the reason the judicial remedy is provided; there is a "friction between Congress' decision to guarantee a minimum level of income for the community spouse and its failure to mandate the transfer of income necessary in many cases to realize that guarantee." *Id.* at 494.

Blumer also recognized that the MCCA was designed to advance "cooperative federalism" and that "[w]hen interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the States, *at least where the superintending federal agency has concluded that such latitude is consistent with the statue's aims.*" *Id.* at 495 (citing *Harris v. McRae*, 448 U.S. 297, 308 (1980) *and Batterton v. Francis*, 432 U.S. 416, 429 (1977)) (emphasis added). Unlike those "other statutes so structured," however, the latitude the Mississippi Division of Medicaid has taken is not consistent with the statute's aims – one of which is an explicit endorsement of pre-filing judicial relief under 42 U.S.C. § 1396r-5(d)(5). Accordingly, since the statute clearly provides pre-filing judicial relief, the Division should not be permitted to force applicants into administrative remedies that would, by the Division's own rules, ultimately require a court order, anyway. *Blumer* reinforced that this Court "ha[s] long noted Congress' delegation of extremely broad regulatory authority to the Secretary in the Medicaid area," and this Court should reaffirm that stance today. *Id.* at 496 (internal citations omitted).

2. The Division's Own Rules and Publications by the Department of Health and Human Services Conflict With the *Alford* Decision

The Centers for Medicaid and Medicare services ("CMS"), a division of the Department of Health and Human Services, is the federal department responsible for the oversight and

administration of the Medicaid system in this country. The CMS specifically interprets 42 U.S.C. § 1396r-5 to include a separate judicial method of determining the amount of countable assets a Community Spouse is able to retain. According to CMS, the "Protected Resource Amount" (PRA):

> is *the greatest of*: (1) the spousal Share, up to a maximum of $109,560 in 2009; (2) the state spousal resource standard, which a state can set at any amount between $21,912 and $109,560 in 2009; (3) *an amount transferred to the community spouse for her/his support as directed by a court order*; (4) or an amount designated by a state hearing officer to raise the community spouse's protected resources up to the minimum monthly maintenance needs standard.

Centers for Medicare & Medicaid Services, Spousal Impoverishment (http://www.cms.hss.gov, last accessed on Feb. 2, 2009, App. 33).

Further, the Department of Health and Human Services issued a publication in April of 2005 that also indicated the judicial remedy is an entirely separate option from the "fair hearing" administrative remedy. Specifically, according to CMS, "Medicaid rules provide three pathways for the community spouse to receive a larger MMMNA" and those methods are listed as follows: (1) it may be raised by those community spouses who show that they have "exceptional housing costs," (2) after a state Medicaid hearing finding extreme financial hardship, and (3) the community spouse "may seek a court order for additional support." Spouses of Medicaid Long-Term Care Recipients, Dep't of

Health & Human Services, Policy Brief #3, 4-5. This publication further provided the following resources:

> The community spouse may be able to retain more than the maximum protected amount by: (1) obtaining a court [order] for more; (2) requesting a hearing to petition for an amount sufficient to generate income consistent with Medicaid income protection guidelines for spouses . . . .

Id. at 6.

While these regulations are not binding on Mississippi state courts, they certainly make clear that the Federal agency that is exclusively charged with the oversight of the Medicaid program in all fifty (50) states recognizes the concurrent remedies from the pre-set default MMMNA and CSRA amounts – (a) a court remedy and (b) an administrative remedy. CMS clearly recognizes that a court order is one means to increase the CSRA and/or MMMNA amounts that a community spouse is able to retain for self-support.

In determining the states' motive in denying the court-order path for an increase, one must look no further than Mississippi's own regulations which provide that administrative relief from these preset defaults is not permitted by the agency because the Division cannot award the Community Spouse "a share larger than the federal maximum" without a court order. To then say that court-order original jurisdiction is not allowed is to deny the very federal remedy of court-order relief created by the MCCA altogether. Mississippi Division of Medicaid Eligibility Manual, Volume III, Section I, 9210, App. 35. Under the court's holding in *Alford*, therefore,

one must first file for Medicaid benefits and ask Medicaid for an increase, which Medicaid by its own regulations does not have the power to give. Upon denial of the request for increase, Medicaid would then have the applicant appeal the decision to a local "fair hearing" and then to a "state hearing" before Medicaid hearing officers who also do not have authority under the state regulations to grant an increase. It is only then, after exhaustion of pursuit of a remedy that the agency does not have the power to grant, and while retaining assets that are in excess of the permitted maximums, that the applicant could appeal to a court for an increase to the CSRA and/or MMMNA. At that stage however, the court would be reviewing the case, not de novo as a trial court, but as an administrative appeal under an "arbitrary and capricious" standard. *PERS v. Ross*, 829 So. 2d 1238 (Miss. 2002); *Miss. Bureau of Narcotics v. Stacy*, 817 So. 2d 523 (Miss. 2002). Such a standard could never be met by an aggrieved applicant, since a hearing officer who denied relief that it did not have the power to grant could only act arbitrarily if they actually granted the relief sought. The result, then, is to completely deny applicants this court-ordered remedy created by federal law. Such a result is clearly antagonistic to this Court's precedent, CMS publications, unambiguous statutory language, and legislative intent.

3. The *Alford* Decision Directly Conflicts With Numerous Supreme Court of Mississippi Decisions

The Supreme Court of Mississippi has repeatedly stated administrative remedies that "provide *plain, speedy adequate and complete relief*"

must be exhausted. *PERS v. Hawkins*, 781 So. 2d 899, 907 (Miss. 2001) (citing *Hood v. Mississippi Dep't of Wildlife Conservation*, 571 So. 2d 263, 268 (Miss. 1990). Clearly, as outlined above, the case *sub judice* is not one in which administrative remedies can provide any relief, much less speedy, adequate, and complete relief. As such, the doctrine of exhaustion of administrative remedies should not have been applied in *Alford* as a means to deny a federally created right to a pre-application review.

C. Certiorari is Appropriate Because this Case Involves an Important Question of Federal Law that Has Not Been, But Should Be, Settled By This Court

While Mr. Alford died during the appeal to the Mississippi Supreme Court, that court found the public interest exception to the doctrine of mootness applied because of the advancing age of the population and the impact Medicaid has on many Mississippians. *Alford*, 30 So.3d at 1214. It is clear Medicaid impacts a significant number of the national population, as well; the Patient Protection and Affordable Care Act, the health care reform legislation signed into law on March 23, 2010, expands Medicaid significantly to cover millions more low-income, uninsured individuals. KAISER COMMISSION ON MEDICAID & THE UNINSURED, OPTIMIZING MEDICAID ENROLLMENT: PERSPECTIVES ON STRENGTHENING MEDICAID'S REACH UNDER HEALTH CARE REFORM (April 2010). In *Super Tire Engineering Company v. McCorkle*, this Court stated:

> Certainly, the pregnant appellants in Roe v. Wade . . . had long since outlasted their

> pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. Similar and consistent results were reached in Storer v. Brown; Rosario v. Rockefeller; Dunn v. Blumstein; and Moore v. Ogilvie, cases concerning various challenges to state election laws. *The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society* . . . . [L]ike pregnancy at nine months and elections spaced at yearlong or biennial intervals, [we] should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.

416 U.S. 115, 126-27 (1974) (emphasis added, internal citations omitted). *Alford* pointed out that the issues raised therein were of significant importance "[a]s our current population continues to age and our state's coffers become more strained, . . [especially since] Medicaid impacts many Mississippians." *Alford*, 30 So. 3d at 1214. Medicaid certainly impacts many citizens of every state, and states' authority under federal law to increase CRSA and/or MMMNRA amounts by court order prior to filing for Medicaid benefits is an issue that has been regularly litigated over the past several years, is of major significance to the states for both financial and planning purposes, and is one that is ripe for review by this Court.

1. This Case Presents A Question Of Significant National Importance

The often litigated issue in this case is of significant national concern, particularly at a time when the level of federal funding of the Medicaid program is decreasing, and demands on states to include more and more applicants is increasing. *See, e.g.*, Patient Protection & Affordable Care Act (expanding Medicaid to include one-hundred thirty-three (133) percent of federal poverty level); Elizabeth A. Weeks, COOPERATIVE FEDERALISM & HEALTHCARE REFORM: THE MEDICARE PART D 'CLAWBACK' EXAMPLE, 1 STLUJHLP 79, 102 (2007) (discussing the increased enrollment from Medicare Part D expansion). The *Alford* decision calls into question the legitimacy of requiring people to exhaust administrative remedies that are often futile when the MCCA clearly and unambiguously provides an alternative remedy through a pre-application court order. The Division of Medicaid's manual gives no discretion to case workers or hearing officers to make a spousal increase. Only a court can do that under Medicaid's rules. This begs the question, if Medicaid cannot give the relief anyway, what is the applicant supposed to exhaust? Mrs. Alford was not seeking to do an "end run" around the Division of Medicaid, but simply sought relief that Medicaid is not authorized to grant, and which federal law and Medicaid's own regulations place exclusively before a trial court.

Pursuit of the available administrative remedies in a case such as this would have been wasteful and caused unnecessary delay and expense. When a court hearing would be comparatively less

expensive than solving this issue in an administrative arena, then the exhaustion of administrative remedies is not required under Mississippi law. *Hawkins*, 781 So. 2d 899. Requiring an individual to first file for administrative relief that the agency itself cannot, by its own admission, grant is a complete waste of resources and will multiply the attorneys' fees and costs of all parties many times over. Because the Division of Medicaid is unable to give the relief Mrs. Alford requested, and further, because no dispute exists that a "court" is the only authority that can grant the relief requested, there is no question that ultimately a court proceeding would be necessary to give Mrs. Alford the sought relief.

Medicaid has forty-five (45) days to make an initial determination, and as long as ninety (90) days on difficult or unusual files such as those seeking this type of relief. Then, appeal before a local hearing officer may take an additional thirty (30) days or more. A state hearing frequently can take as long as an additional ninety (90) days, and then Medicaid has an unspecified time in which to render a decision or remand the case for further information gathering. Miss. Code Ann. § 43-13-116 (2010). During each month this is occurring the Medicaid applicant is required to privately pay for his or her nursing home stay, which the Division of Medicaid estimates to be, on average, $4,600 per month. Then and only then, according to the Division of Medicaid, should an applicant be allowed to seek relief from a court, which has its own inherent delays due to docket crowding.

This process makes planning for individuals in such circumstances nearly impossible and a true gamble. The applicant and spouse will be forced to endure months, or even years, of private payment while their case is on the path of a futile administrative review, before finally reaching court, the only entity in the entire process with the ability to grant the requested relief. If the court then ultimately denies the relief, the applicant would have to re-structure their remaining assets, which will have been significantly reduced during the administrative and appellate delay as a result of privately paying for services, before re-applying.

Congress intended that the support order by a court could be granted prior to application for benefits, which allows the Medicaid applicant to plan and structure his or her assets in the manner most beneficial to his or her spouse. Both the state and the federal government have strong public policies against the impoverishment of a healthy non-institutionalized spouse. By recognizing that court orders of support in 42 U.S.C. § 1396r-5 can be entered prior to application, and that this statute gives the trial courts the subject matter jurisdiction to accomplish this, this Court will serve the interest of Congressionally recognized spousal self-reliance.

2. The *Alford* Decision Misinterpreted Federal Medicaid Law Regarding the Prevention of Spousal Impoverishment, Thereby Minimizing A Key Purpose Of Federal Medicaid Law

Certiorari is also appropriate in the present case because *Alford* misinterpreted federal Medicaid

law in a way that undercuts the primary purpose of the MCCA: to assure the community spouse has income and resources sufficient to live with independence and dignity. A basic principle of statutory construction provides that related statutes must be read *in pari materia*, keeping in mind the purpose of the entire federal scheme, *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972), a principle that the *Alford* decision ignored. The *Alford* court likewise erred in holding that 42 U.S.C. § 1396r-5(d)(5) does not confer subject matter jurisdiction to state courts to determine if CSRA and/or MMMNA amounts can be increased. *See, e.g.* 28 U.S.C. §§ 1331-32, giving federal courts concurrent jurisdiction with state courts over federal question and diversity questions.

The courts in the District of Columbia, New Jersey, and Tennessee have correctly recognized that 42 U.S.C. § 1396r-5(d)(5) provides an independent, alternative way to seek an increase in the CSRA and/or MMMNA amounts. The Supreme Court of Mississippi, however, erroneously applied the doctrine of exhaustion of administrative remedies. In so holding, the court reached a result that is not only inconsistent with interpretations of the law rendered by the United States Department of Health and Human Services, this Court, and several other courts, but also is antithetical to Congress's intention to prevent the pauperization of community spouses.

CONCLUSION

For the reasons and based upon the authorities set forth above, the Petitioner

respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

RONALD CRAIG MORTON
Counsel of Record for the Petitioner
132 Fairmont Street, Suite A
Clinton, Mississippi 39056
(601) 925-9797
rmorton@mortonlaw.com

June 23, 2010

42 U.S.C. § 1396r-5(d)(5):
Court ordered support
If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

42 U.S.C. § 1396r-5(e):
Notice and fair hearing
(1) Notice
Upon--
(A) a determination of eligibility for medical assistance of an institutionalized spouse, or
(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.
(2) Fair hearing
(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section); such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community

spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(f)(3):
Transfers under court orders
If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01984-SCT
JO CAROL ALFORD, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ARTHUR RANDALL ALFORD, DECEASED
v. MISSISSIPPI DIVISION OF MEDICAID
DATE OF JUDGMENT: TRIAL JUDGE: COURT FROM WHICH APPEALED: ATTORNEYS FOR APPELLANT:
ATTORNEYS FOR APPELLEE:
NATURE OF THE CASE: DISPOSITION: MOTION FOR REHEARING FILED: MANDATE ISSUED:
12/02/2008 HON. CYNTHIA L. BREWER MADISON COUNTY CHANCERY COURT RONALD C. MORTON A. ELIZABETH WHITAKER OFFICE OF THE ATTORNEY GENERAL BY: WILLIAM H. MOUNGER CHARLES P. QUARTERMAN CIVIL - STATE BOARDS AND AGENCIES AFFIRMED - 03/25/2010
BEFORE WALLER, C.J., LAMAR AND PIERCE, JJ.
LAMAR, JUSTICE, FOR THE COURT:

¶1. This appeal presents a case of first impression and requires us to interpret the "spousal impoverishment" provisions of the Medicare Catastrophic Coverage Act of 1988 (MCCA), codified at 42 U.S. Code Section 1396r-5 (2006). Specifically, this Court must determine whether our state courts have subject matter jurisdiction over petitions requesting relief under Chapter 42 of the United States Code, Section 1396r-5, prior to a determination of Medicaid eligibility. Finding that the chancery court did not have jurisdiction, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. Prior to filing an application for Medicaid, Jo Carol Alford filed a petition in chancery court to increase the community spouse resource allowance (CSRA) and the minimum monthly maintenance needs allowance (MMMNA) under 42 U.S. Code Section 1396r-5. She averred that her husband, Arthur Randall Alford, suffered from multiple sclerosis, and the maximum MMMNA and CSRA allowed by the Mississippi Division of Medicaid (Division) were insufficient to prevent her impoverishment once her husband entered a nursing home and applied for Medicaid. In its answer, the Division averred that no application had been filed on behalf of Mr. Alford for Medicaid eligibility, and that the Alfords had failed to exhaust administrative remedies.

¶3. At a hearing on the matter, Mrs. Alford's counsel asserted the court had jurisdiction under 42 U.S. Code Section 1396r-5, as well as equitable jurisdiction to rule on domestic relations matters. Mrs. Alford's counsel also argued that under state regulations, the Division was prohibited from awarding a greater share of resources above the federal maximum, but that the regulations recognized the court's authority to do so. Counsel proceeded to question Mrs. Alford and a certified public accountant regarding the Alfords' finances and the projected depletion of their income and assets once Mr. Alford was placed in a nursing home. At the close of the hearing, counsel for Mrs. Alford requested alternative relief in the form of a qualified domestic relations order (QDRO), transferring Mr. Alford's retirement assets in the amount of $400,000 to Mrs. Alford.

¶4. The Division did not cross-examine Mrs. Alford

or the accountant, maintaining the court lacked jurisdiction. The Division argued that it had sole authority and jurisdiction to consider the matter, and that the chancery court was limited to judicial review of the agency's final decision.

¶5. The chancery court found that it had jurisdiction to grant separate maintenance via a QDRO. It further held that it had no authority to grant relief under 42 U.S. Code Section 1396r-5 prior to the Alfords exhausting their administrative remedies. Mrs. Alford timely filed her notice of appeal, objecting to the chancery court's finding that it lacked jurisdiction under 42 U.S. Code Section 1396r-5.

¶6. During the pendency of this appeal, Mr. Alford passed away. Mrs. Alford filed a motion to substitute Arthur Randall Alford, individually, with the executrix of his estate, Jo Carol Alford. Mrs. Alford asserted that the "Division of Medicaid will, no doubt, argue that the issues before this Court are moot . . . [but] the sole issue of whether subject matter jurisdiction exists in the Chancery Court to increase Community Spouse Resource Allowance and Minimum Monthly Maintenance Needs Allowance remains relevant in this and future cases around the state." This Court granted the motion to substitute.

DISCUSSION

I. WHETHER MR. ALFORD'S DEATH RENDERS THIS CASE MOOT.

¶7. The Division asserts that the action is now moot. The Division argues that Mr. Alford failed to apply for Medicaid benefits prior to his death, and that the executrix of Mr. Alford's estate failed to

apply "within the appropriate time period after his death." Mrs. Alford concedes the controversy is now moot, but argues the Court should apply the "public-interest" exception and decide the merits of this action.

¶8. This Court has ruled that "[c]ases in which an actual controversy existed at trial but the controversy has expired at the time of review, become moot." ***Monaghan v. Blue Bell, Inc.***, 393 So. 2d 466, 466 (Miss. 1980). "This Court will not adjudicate moot questions." ***Allred v. Webb***, 641 So. 2d 1218, 1220 (Miss. 1994) (citations omitted). However, there is an exception, and the mootness rule will not be applied "when the questions involved are matters affecting the public interest." ***Id.*** We have ruled "there is an exception to the general rule as respects moot cases, when the question concerns a matter of such nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct." ***Sartin v. Barlow ex rel. Smith***, 196 Miss. 159, 16 So. 2d 372, 377 (1944).

¶9. We find that this case presents such a matter of public interest. As our current population continues to age and our state's coffers become more strained, we find that this dispute falls within the public-interest exception. Medicaid impacts many Mississippians, and we therefore find it prudent to "declare . . . a rule for future conduct" regarding the jurisdiction of the courts to increase the MMMNA and CSRA. ***Id.***

II. WHETHER OUR TRIAL COURTS HAVE SUBJECT MATTER JURISDICTION UNDER 42 U.S. CODE SECTION 1396r-5 TO INCREASE

THE MMMNA AND THE CSRA PRIOR TO AN AGENCY DETERMINATION OF MEDICAID ELIGIBLITY.

A. Background

¶10. The Medicaid program is part of Title XIX of the Social Security Act, enacted in 1965. 42 C.F.R. § 430.0 (2009). It is jointly financed by the state and federal governments to provide "medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependant children or qualified pregnant women or children." *Id.* State participation is voluntary, and each state determines eligibility within "broad Federal rules."[2] *Id.* ¶11. In order to be eligible for Medicaid, the applicant must meet certain financial and non- financial criteria. *See* Miss. Code Ann. § 43-13-115 (Rev. 2009). Married applicants who receive long-term care (i.e., institutionalized spouses) have specific limitations on their income and resources.[3] The Division must determine the couple's income and resources and allocate resources between the institutionalized spouse and the community spouse when determining eligibility. *See* 42 U.S.C. §1396r-5 (2006). This determination is governed by 42 U.S. Code Section

---

[2] The Centers of Medicare and Medicaid Services (CMS) is the federal agency that implements the Medicaid program. *See* CMS website, located at http://www.cms.hhs.gov (last accessed February 22, 2010).

[3] In 2009, an institutionalized applicant could have a monthly income of up to $2,022 and total resources of up to $4,000. Mississippi Division of Medicaid, Guidelines for the Aged, Blind, and Disabled Living in Nursing Homes, located at http://www.medicaid.ms.gov (last accessed February 22, 2010) (click on Medicaid Eligibility).

1396r-5, the statute at issue in this case.

B. 42 U.S.C. § 1396r-5

¶12. The spousal-impoverishment provisions of the MCCA affect the allocation of income and resources between the institutionalized and community spouses. *See* 42 U.S.C. § 1396r-5 (2006). The statute provides rules for treatment of income and resources during the eligibility process and post-eligibility. *See id.* ¶13. In computing resources for purposes of eligibility, the state agency must assess the couple's "total value of the resources."[4] 42 U.S.C. § 1396r-5(c)(1)(A)(I) (2006). The community spouse is allowed to retain a community spousal resource allowance (CSRA), which is excluded from the eligibility calculation and is subject to a statutory cap.[5] ***Wis. Dep't of Health & Family Servs. v. Blumer***, 534 U.S. 473, 482-83, 122 S. Ct. 962, 151 L. Ed. 2d 935 (2002) (citing 20 C.F.R. § 416.1205). The MCCA specifically defines the CSRA as follows:

[T]he "community spouse resource allowance" for the community spouse is an amount (if any) by which –

(A) the greatest of –

---

[4] The agency will calculate the total amount of the couple's resources and allocate half to each spouse (spousal share). 42 U.S.C. § 1396r-5(c)(1)(A) (2006).

[5] In 2009, this maximum amount was $109,560. CMS website, 2009 SSI and Spousal Impoverishment Standards, located at http://www.cms.hhs.gov/MedicaidEligibility/Downloads/1998-2010SSIFBR122909.pdf (last accessed February 22, 2010). The State standard for the CSRA is the maximum standard permitted by federal law. Mississippi Division of Medicaid website, Mississippi Division of Medicaid State Plan at 26a of Attachment 2.6-A, located at http://www.medicaid.ms.gov/MississippiStatePlan.aspx (last accessed February 22, 2010).

(i) $12,000 (subject to adjustment under subsection (g) of this section [which governs inflation]), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section), (iii) *the amount established under subsection (e)(2) of this section* [Fair hearing provision]; or

(iv) *the amount transferred under a court order under paragraph (3)[.]*[6]

42 U.S.C. § 1396r-5(f)(2)(A) (2006) (emphasis added). McCormick's treatise provides the following explanation for understanding the statute's definition of the CSRA:

> For example, the Medicaid statute permit[s] the community spouse to keep a "community spouse resource allowance" (CSRA) equal to the greatest of $12,000 adjusted for inflation or one half of the couple's resources up to $60,000 adjusted for inflation. The state may also simply permit the community spouse to retain resources up to the inflation adjusted $60,000 figure. Alternatively, by court order, or by decision of an administrative judge (where additional resources are necessary to produce income to support the community spouse), the

---

[6] Paragraph (3) relates to "[t]ransfers under court orders" and provides that: If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or family member (as defined in subsection (d)(1) of this section). 42 U.S.C. § 1396r-5(f)(3) (2006).

> community spouse may be permitted to keep a greater amount.

Harvey L. McCormick, *Medicare and Medicaid Claims and Procedures* § 28:17 (4th ed. 2005). "[An] enhanced CSRA will reduce the resources the statute deems available for the payment of medical expenses; accordingly, the institutionalized spouse will become eligible for Medicaid sooner." ***Blumer***, 534 U.S. at 483-84, 122 S.Ct. 962.

¶14. Once the institutionalized spouse becomes eligible, the agency must determine the amount of income "that is to be applied monthly to payment for the costs of care in the institution." 42 U.S.C. § 1396r-5(d)(1) (2006). In determining the amount of income that is to be applied for the cost of care, the statute allows various protected amounts to be deducted from the institutionalized spouse's income, one being the community spouse monthly income allowance (CSMIA). 42 U.S.C. § 1396r-5(d)(1)(B) (2006). The CSMIA is calculated based upon the minimum monthly maintenance needs allowance (MMMNA). 42 U.S.C. § 1396r- 5(d)(2) (2006). The statute provides the following definition of the CSMIA:

> In this section (*except as provided in paragraph (5)*), the "community spouse monthly income allowance" for a community spouse is an amount by which –
>
> (A) *except as provided in subsection (e)* of this section, *the minimum monthly maintenance needs allowance* (established under and in accordance with paragraph (3)) for the spouse, exceeds (B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an

allowance).

42 U.S.C. § 1396r-5(d)(2) (2006) (emphasis added). The MMMNA is established by each state based upon the official poverty line and an excess-shelter allowance; however, it is subject to a statutory cap.[7] 42 U.S.C. § 1396r-5(d)(3) (2006).

¶15. The language "except as provided in paragraph (5)" (in the definition of the CSMIA) references the following provision, which is also relevant to this case:

> **(5) Court ordered support**
>
> If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered.

42 U.S.C. § 1396r-5(d)(5) (2006).

¶16. The definition of the CSMIA references another relevant provision, subsection (e)(2), which is the fair-hearing provision:

> **(2) Fair hearing**
>
> **(A) In general**
>
> If either the institutionalized spouse or the community spouse is dissatisfied with the

---

[7] In 2009, the maximum MMMNA was $2,739. Mississippi Division of Medicaid website, Guidelines for the Aged, Blind and Disabled Living in Nursing Homes, located at http://www.medicaid.ms.gov (last accessed February 22, 2010) (click on Medicaid Eligibility). The Division allows the maximum under federal law. Mississippi Division of Medicaid website, State Plan at 4c of Attachment 2.6A, located at http://www.medicaid.ms.gov/MississippiStatePlan.aspx (last accessed February 22, 2010).

determination of – (i) the community spouse monthly income allowance; (ii) the amount of the monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section; (iii) the computation of the spousal share of resources under subsection (c)(1) of this section; (iv) the attribution of resources under subsection (c)(2) of this section; or (v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section); such spouse *is entitled to a fair hearing* described in section 1396a(a)(3) of this title with respect to such determination *if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse.* Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) ***Revision of minimum monthly needs allowance***

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial distress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) ***Revision of the community spouse resource allowance*** If either such spouse establishes that the community spouse resource

> allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2) (2006) (emphasis added).

C. Merits of the Case

¶17. When reviewing an issue of subject matter jurisdiction, this Court applies a de novo standard of review. ***Schmidt v. Catholic Diocese of Biloxi***, 18 So. 3d 814, 821 (Miss. 2009).

¶18. Mrs. Alford contends that the "unambiguous" language of the MCCA provides our state courts with authority to increase the CSRA and the MMMNA.

Mrs. Alford points to 42 U.S. Code Section 1396r-5(d)(5) and 42 U.S. Code Section 1396r-5(f)(3) in support of her argument. As noted *supra*, those provisions provide that:

> **(5) Court ordered support**
>
> If a court *has entered* an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered.

42 U.S.C. § 1396r-5(d)(5) (2006) (emphasis added).

> **(3) Transfers under court orders**
>
> If a court *has entered* an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources

> transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

42 U.S.C. § 1396r-5(f)(3) (2006) (emphasis added). Mrs. Alford argues that the phrase "has entered" indicates that a court order must be entered prior to an application for Medicaid benefits. She asserts that 42 U.S. Code Section 1396r-5 provides for two, alternative mechanisms for increasing the MMMNA and CSRA: (1) by court order prior to filing a Medicaid application, and (2) filing an application for Medicaid and increasing the MMMNA and CSRA through the fair-hearing process under 42 U.S. Code Section 1396r-5(e). In support of her argument, Mrs. Alford cites ***Blumberg v. Tennessee Department of Human Services***, 2000 WL 1586454 (Tenn Ct. App. Oct. 25, 2000), and ***M.E.F. v. A.B.F.***, 925 A.2d 12 (N.J. Super. Ct. App. Div. 2007).

¶19. In ***Blumberg***, the plaintiff filed a petition in circuit court requesting a transfer of his wife's assets and an increase in the MMMNA. ***Blumberg***, 2000 WL 1586454 at *1. The court ordered the plaintiff's wife to pay all of her monthly income to her husband as a "community spouse allowance." ***Id.*** Thereafter, the plaintiff filed a Medicaid application on behalf of his wife. ***Id.*** While his wife was approved for Medicaid, the plaintiff was denied an increase in his income allocation. ***Id.*** The agency ordered that the wife's monthly income was to be applied to her cost of care. ***Id.***

¶20. On appeal, the Tennessee Court of Appeals determined that the agency had exceeded its jurisdiction by reversing the circuit court's order. ***Id.*** at *2. In deciding this issue, the appellate court determined that the language of 42 U.S. Code

Section 1396r-5(d)(5) and 42 U.S. Code Section 1396r-5(e) of the MCCA provided "two absolute alternative methods of setting a spouse's allowance and we are bound to recognize both procedures." ***Id.*** at *2-*3. Accordingly, the court held the agency was without authority to ignore the circuit court's order. ***Id.*** In support of its holding, the court reasoned that "had the legislature intended a different interpretation, it could simply have stated in precise language that the administrative process is the only procedure available." ***Id.***

¶21. Similar to the Tennessee Court of Appeals, the New Jersey Superior Court has implicitly ruled that the MCCA provides two independent means to increase the MMMNA. ***M.E.F. v. A.B.F.***, 925 A.2d 12 (N.J. Super. Ct. App. Div. 2007). In ***M.E.F.***, the institutionalized spouse had been receiving Medicaid benefits when the community spouse petitioned the family court for separate maintenance under the state's domestic laws. ***Id.*** at 15. The family court denied the petition for "lack of factual support and procedural inadequacies." ***Id.*** Thereafter, the community spouse petitioned the state agency for an increase in her MMMNA, which the agency granted. ***Id.***

¶22. After obtaining an increase in the MMMNA, the community spouse renewed her motion for separate maintenance in family court. ***Id.*** At a hearing on the motion, the community spouse argued for an additional increase in her MMMNA. ***Id.*** at 15-16. The family court denied the motion, ruling that the "MCCA's provisions regarding court orders of support applied only to orders already in existence [prior to institutionalization]." ***Id.*** at 16.

¶23. On appeal, the Superior Court held that the

community spouse's effort to obtain a court order after she had requested an increase in the MMMNA from the agency constituted 12 impermissible "parallel litigation and a form of forum shopping." ***Id.*** at 20. The court reasoned that, "having embarked upon the administrative path by receiving and challenging the MMMNA provided to her, [the community spouse] is limited to that path until a final administrative determination has been reached." ***Id.*** at 22.

¶24. While the courts in ***Blumberg*** and ***M.E.F.*** ruled only upon the issue of jurisdiction to increase the MMMNA, the Superior Court of the District of Columbia has ruled that the MCCA provides two alternative methods of increasing the MMMNA *and* the CSRA. ***In re Estate of Tyler***, 2002 WL 1274125, *3 (D.C. Super. May 30, 2002). In ***Tyler***, the plaintiff petitioned the trial court for a transfer of all the institutionalized spouse's assets and an order awarding her income and resources for her support as a community spouse. ***Id.*** at *1. The plaintiff filed her petition after her spouse had applied for Medicaid, but prior to Medicaid's determination of the spouse's eligibility. ***Id.*** at *1-*2. During the pendency of the court proceedings, the state agency denied Medicaid benefits due to excess resources. ***Id.*** at *3.

¶25. While the trial court denied the petition, it found that, under the MCCA, the community spouse may seek either administrative or judicial relief to increase the MMMNA and the CSRA. ***Id.*** at *2-3 (citing 42 U.S.C. § 1396r-5(e) and 42 U.S.C. § 1396r-5(d)(5)). After reviewing the "express language" of 42 U.S. Code Section 1396r-5, the court stated "[t]here can be no doubt . . . that Congress intended that

spousal support orders for income not only be taken into account [by the agency] in calculating income allowances, but also bypass the standard Medicaid rules regarding resources and income." ***Id.*** at *6 (citing 42 U.S.C. §§ 1396r-5(d)(2) and (A), (d)(5), and (f)(2)(A)(iv) and (f)(3)). In other words, the court found that court orders "preempt the spousal resource and income allowances" under the MCCA. ***Id.***

¶26. The Division urges this Court to adopt the holding of ***Arkansas Department of Health & Human Services v. Smith***, 262 S.W.3d 167 (Ark. 2007), which is contrary to ***Blumberg***, ***M.E.F.***, and ***Tyler***. The Arkansas Supreme Court held that the state agency charged with administering Medicaid is the "*sole entity* that may determine whether a Medicaid applicant is eligible for Medicaid, *as well as for any of the deductions or allowances permitted under the MCCA.*" ***Ark. Dep't of Health & Human Servs.***, 262 S.W.3d at 173 (emphasis added). In reaching its decision, the appellate court analyzed those MCCA provisions that refer to a "court order," 42 U.S. Code Sections 1396r-5(d)(5), (f)(2)-(3). ***Id.*** at 172-73. The court agreed with the agency's argument that "reading the statute in its entirety makes it clear that any allocation of a couple's assets can only occur after a determination of Medicaid eligibility has been made." ***Id.*** at 172. The court noted that Section 1396r-5(b)(2) "speaks of the attribution of income 'for purposes of the *post-eligibility* income determination'" and that Section 1396r-5(d)(1) "permits deductions or allowances from the institutionalized spouse's income '*after an institutionalized spouse is determined . . . to be eligible* for medical assistance.'" ***Id.*** (quoting 42

U.S.C. §§ 1396r-5(b)(2), (d)(1)). The court noted that Congress expressly had authorized state and local agencies to determine Medicaid eligibility under 42 U.S. Code Section 1396(a)(a)(5). ***Id.*** Furthermore, the court focused on the language of Section 1396r-5(f)(2)-(3) and provided the following analysis, which we find especially relevant to this case:

> [The community spouse] then goes on to argue that Congress used the word "shall" in § 1396r-5(f)(3), thereby making the language mandatory. However, what [the community spouse's] argument fails to recognize is that the word "shall" does not actually appear to direct DHHS to apply the court's order. Reading the statute closely reveals that what the Medicaid-administering agency "shall" do is not apply 42 U.S.C. § 1396p to resources transferred pursuant to such order. Section 1396p deals with liens, adjustments and recoveries, and transfers of assets. That statute discusses when a lien may be imposed against the property of an individual who has been receiving medical assistance.
>
> Moreover, the fallacy in [the community spouse's] reliance on subsections (f)(2) and (f)(3) becomes apparent when one reads § 1396r-5(f)(1), which provides as follows:
>
> An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph(2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. *The transfer under the preceding sentence shall*

> *be made as soon as practicable after the date of the initial determination of eligibility*, taking into account such time as may be necessary to obtain a court order under paragraph (3).
>
> (Emphasis added.) The emphasized language makes it clear that the transfers between an institutionalized spouse and a community spouse, as specified in this statute must, transpire *after* a determination has been made about the institutionalized spouse's Medicaid eligibility.

Id. at 172-73.

¶27. The court further noted that the community spouse could seek administrative review of the CSMIA (the community spouse's monthly income allowance), and the CSRA under the MCCA's fair-hearing provisions and then seek judicial review. ***Id.*** at 173-74 (citing 42 U.S.C. § 1396r-5(e)). The court ruled that agencies are "better equipped than courts, by specialization, insight and experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies." ***Id.*** The court concluded that the "court order" language was "insufficient to confer jurisdiction, even impliedly, on the circuit court[,]" especially given the fact that "sections 1396r-5(d)(5) & (f)(3) only generally reference an order of spousal support; they do not mention a court-ordered CSRA, CSMIA, or MMMNA." ***Id.***

¶28. The Missouri Court of Appeals also has held that its state courts are without jurisdiction under the MCCA. ***Amos v. Estate of Amos***, 267 S.W.3d 761 (Mo. Ct. App. 2008); *see also* ***Huynh v. King***, 269 S.W.3d 540 (Mo. Ct. App. 2008). Finding that the agency had primary jurisdiction, the Missouri Court

of Appeals found:

> The application of Medicaid regulations demands administrative expertise. A single state agency must oversee the program. Uniformity of result is critical. None of these objectives is furthered by conferring parallel jurisdiction on a probate court, and the Act's mere reference to an "amount transferred under a court order," without further explanation, is insufficient to do so.

Id.

¶29. We find that the opinions of the Arkansas Supreme Court and the Missouri Court of Appeals provide a more compelling interpretation of the spousal-impoverishment provisions. Notably, 42 U.S. Code Section 1396r-5(e) specifically provides a mechanism for administrative review and revision of the CSMIA, MMMNA, and CSRA. Furthermore, Mississippi Code Section 43-13-116 sets forth the administrative-hearing process and provides that an aggrieved claimant "is entitled to seek judicial review in a court of proper jurisdiction." Miss. Code Ann. § 42-13-116(3)(e)(xvii) (Rev. 2009). This Court previously has ruled that "'where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act.'" ***Davis v. Barr***, 157 So. 2d 505, 507 (Miss. 1963) (quoting 2 Am. Jur. 2d *Administrative Law*, § 595, p. 426). This Court also has described the doctrine of primary jurisdiction, which is relevant to the case *sub judice*:

> the courts cannot or will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the

> administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered.

Ill. Cent. R. Co. v. M.T. Reed Const. Co., 51 So. 2d 573, 575 (Miss. 1951) (quoting 42 Am. Jur. *Public Administrative Law*, § 254). However, Mrs. Alford argues that the doctrine of administrative remedies should not apply, as the Division's rule states:

> The CS [community spouse] share of total countable resources is the maximum allowed under federal law. In order for a CS to receive a share larger than the federal maximum, *a court order would be required granting the CS a greater share of total resources after Medicaid had made a decision regarding spousal shares.*

Code Miss. R. 13 000 036 at § 9210 (Rev. 1999) (emphasis added). Mrs. Alford argues that the Division's own rules limit its authority to grant the requested relief, and as such, an administrative appeal is futile and a waste of resources.

¶30. We note that this agency rule applies only to "countable resources" and does not specifically address the agency's ability to raise the MMMNA (the needs allowance) above the federal maximum. We reaffirm that the "rule requiring exhaustion of administrative remedies will be applied even though a party contends that the action of the administrative agency is beyond the power and jurisdiction of the agency." ***Everitt v. Lovitt***, 192 So. 2d 422, 428 (Miss. 1966). Furthermore, the relevant

inquiry concerns the provisions of 42 U.S. Code Section 1396r-5, which the Division is bound to follow.

¶31. Keeping in mind the doctrines of exhaustion of administrative remedies and primary jurisdiction, we hold that the statutory language "if a court has entered an order" is insufficient to confer upon the courts parallel jurisdiction to increase the MMMNA and CSRA. We conclude that the plain language of the MCCA does not confer jurisdiction upon our state courts to increase the MMMNA and CSRA prior to an exhaustion of administrative remedies.

CONCLUSION

¶32. We affirm the chancery court's holding that it was without subject matter jurisdiction to increase the MMMNA and CSRA prior to the Alfords exhausting their administrative remedies. ¶33.

AFFIRMED.

WALLER, C.J., CARLSON, P.J., DICKINSON, RANDOLPH, KITCHENS AND PIERCE, JJ., CONCUR. GRAVES, P.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. CHANDLER, J., NOT PARTICIPATING.

IN THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

JO CAROL ALFORD,

PETITIONER

v. CAUSE NO. 2008-993-B

ARTHUR RANDALL ALFORD,

RESPONDENT

ORDER AND JUDGMENT OF SUPPORT

THIS CAUSE, having come on for hearing before this Court upon complaint of Jo Carol Alford seeking an award of separate maintenance and support against her husband, Arthur Randall Alford, and the Court finding that it has jurisdiction over the parties and partial jurisdiction over the subject matter, it is therefore:

ORDERED, ADJUDGED AND DECREED that the Court finds Jo Carol Alford to be separated from her husband, Arthur Randall Alford through no fault of her own, and is entitled to an award of separate support and maintenance during their separation, and this Court does Order an award of separate maintenance and support against Arthur Randall Alford, pursuant to the domestic relations laws of the State of Mississippi, and does order a transfer of his non-deferred assets and retirement assets and other tax-deferred retirement assets currently held in the sole name of Arthur Randall Alford, in an amount of up to $400,000, to the sole name of Jo Carol Alford, with such transfer of those funds currently held in qualified plans to be completed pursuant to a Qualified Domestic Relations Order to be entered separately by this Court, with such transfer being an Order of Separate Maintenance and Support for Jo Carol Alford, under the domestic relation laws of the State of Mississippi providing for the separate

maintenance and support of an abandoned innocent spouse.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that in the event that Arthur Randall Alford returns to the marital home as a party to the marriage, that such assets as shall remain unspent for the support of Jo Carol Alford shall be transferred back to the sole name of Arthur Randall Alford.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court finds that it does not have subject matter jurisdiction pursuant to 42 USC §1396r-5 or any other federal Medicaid law relied upon by the Petitioner in seeking other relief in her Petition, and to the extent that the Petitioner seeks relief arising exclusively from jurisdiction premised on such federal law, such additional relief is denied, based solely on this Court's lack of subject matter jurisdiction to award such additional relief.

SO ORDERED, ADJUDGED, AND DECREED, on the 2nd day of Dec, 2008.

/S/ CYNTHIA L. BREWER
Cynthia Lee Brewer, Chancellor

Agreed as to form:

/S/ Ronald C. Morton
Ronald C. Morton
Counsel for Petitioner

/S/ William H. Mounger
William H. Mounger
Counsel for Division of Medicaid

/S/ William B. Howell
William B. Howell
Counsel for Respondent

IN THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

JO CAROL ALFORD — PETITIONER

VS. — NO. 2008-0993

ARTHUR RANDALL ALFORD — RESPONDENT

TRANSCRIPT OF PROCEEDINGS

. . .

PETITIONER'S OPENING STATEMENT

MR. MORTON: Judge, we're here before the Court seeking an increase in the Monthly Maintenance Needs Allowance and the Community Spouse Resource Allowance for Mrs. Alford. Mrs. Alford is married to Mr. Alford, the defendant or respondent herein, who has been diagnosed with Multiple Sclerosis . . . . There are mechanisms in the law under the Spousal Impoverishment Provisions of Federal Medicaid Law that enable those limits the strict limits of $104,000 and of the $2610 per month -- to be increased. And there are under the statutes two mechanisms by which that increase can happen. One is through fair hearing through making an application for Medicaid before the Division of Medicaid and then seeking a hearing to have those amounts increased.

THE COURT: Why am I hearing this matter in Chancery Court in the state court citing federal statutes?

MR. MORTON: Because you have concurrent jurisdiction. It's federal law, but the state court certainly can enforce it . . . . And the federal statute that says a court order can increase this amount. So what the federal statute, in fact, does is gives

jurisdiction to this court to increase the amount prior to our filing for Medicaid benefits.

...

MEDICAID'S OPENING STATEMENT

...

Medicaid would contend, with all due respect, that this Court has no jurisdiction to act in this matter.

...

the Court is limited to a judicial review of the final decision.

...

in this case not only have the administrative remedies not been exhausted, Mr. Alford has not even applied for Medicaid.

...

We believe that the first step is for Mr. Alford to apply for Medicaid and go through the administrative remedies.

...

MR. MORTON: We would call Jo Carol Alford to the stand.

THE COURT: All right, Mrs. Alford, if you would approach please.

(WITNESS TAKES THE STAND)

JO CAROL ALFORD

...

DIRECT EXAMINATION BY MR. MORTON:

Q. Mrs. Alford, tell the Court a little bit about your background. Who are you married to?

A. Arthur Randall Alford.

...

Q. Tell the Court how you arrived at becoming a Madison County resident.

A. My husband and I came down here for Christmas for a visit in December, and he's had MS since 1986,

and he became ill while we were here. And we've actually been trying to get back home ever since, but he's been going from hospital to hospital getting worse the whole time. So we've not made it home and are still having to live in Madison County.

...

Q. Okay. Do you have any specialized training in any type of employment?

A. No, sir.

Q. How long ago has that been since you've worked as a real estate mortgage broker or --

A. Twenty -- twenty something years. Yeah.

All right. Tell the Court a little bit about Mr. Alford's current condition. I think I have expressed to the Court he has Multiple Sclerosis, but explain to the Court a little about what that means.

A. Well, he's had it since 1986. He was able to work until the middle of last year and had to retire on social security disability because of it. In January he started spiraling downward physically. He developed a blood clot in his thigh, and his leg swelled to the size of his waist, and he lost his ability to walk. And then he had to go into the hospital. He developed a severe bladder infection and was very ill for two weeks. Then he was put into Methodist Rehab for three weeks to try to regain some strength. He came out of Methodist Rehab and was put back into St. Dominic's because he developed MRSA, which is a staff infection. He broke out in boils allover his body and was very, very ill from that for about a month. And then he had to go back to Methodist Rehab to try to regain some more strength. And there he developed hydrocephalus, which is CL fluid on the brain, and he was put back into St. Dominic's, and a shunt was placed in because of the hydrocephalus

that would drain the fluid from his brain into his stomach. And he stayed back in St. Dominic's for about three more weeks trying to get over that, and then he was placed back in Methodist Rehab. That's where he is now, but they've taken him twice back to St. Dominic's because the shunt doesn't seem to be working properly. And he's not doing very well. They told me I would have to start looking at nursing homes for him to go into.

Q. Is he able to walk? Is he ambulatory?

A. No, sir. He can't walk. He can't even sit up . . . it's not good because after you have MS for about twenty years, basically, you just start spiraling downward, and you don't come out of it. So the doctors have told me he's going to have to have long-term care in a facility . . . .

Q. Since June 4th has he been continuously under the care of institutions?

A. He's been home for a few weeks in between, but then he would get sick again and have to go back to the hospital.

...

MATTHEW FREELAND

VOIR DIRE EXAMINATION BY MR. MORTON:

Q. Mr. Freeland, tell the Court your full name.

A. Matthew Edward Freeland.

Q. And do you have any professional degrees, Mr. Freeland?

A. I am a certified public accountant.

Q. In your capacity as a certified public accountant, do you have occasion to run income and asset projections for people?

A. Yes.

MR. MORTON: Judge, I would tender the witness as an expert in running financial calculations on income

and assets for, in this case, Mrs. Alford.

THE COURT: Okay. And what is your educational background as to that?

THE WITNESS: I have a Masters in accounting from the University of Mississippi.

THE COURT: ... If there is no objection, then this Court qualifies you.

...

DIRECT EXAMINATION BY MR. MORTON:

Q. Mr. Freeland, have you had an opportunity to look at Mrs. Alford's financial situation?

. . . I've looked at that . . . Mrs. Alford's life expectancy according to the Social Security Administration and the HCFA Guidelines [is] twenty-five years.

Q. So in other words this scenario is if current assets and numbers and Mr. Alford had to go to a nursing home now and be private pay and then died five years later, that's what this represents?

A. Exactly.

Q. All right. What does this schedule show Mrs. Alford running out of money?

A. Well, she would be running out of money by the end of 2013.

...

Q. Now, Mr. Freeland, I've handed you another document that up in the upper right hand side it says, "Full Retirement Balance/Medicaid Income Cap $1911(5 years). Can you tell the Court what this page represents?

A. This represents where the Medicaid income cap of $1,911 is applied as income. So for 2009 forward, or for the first five years, it is capped at that $1911 and adjusted for inflation. After that five years, beginning in 2014, the social security disability

income from Mr. Alford would become Mrs. Alford's income. Based on this her money would run out in 2020.

. . .

Q. SO this scenario then assumes she gets to keep all of the assets through a court ordered enlargement of the Community Spouse Resource Allowance and receives only $1,911 of his money on income?

A. For the first five years.

Q. And what's significant again about the five years in this calculation?

26 A. After five years we're assuming that Mr. Alford has deceased.

Q. Okay. So again this assumes that he lives four or five years but goes on Medicaid immediately, correct?

A. Right.

MR. MORTON: I would ask that this be marked as Exhibit 3.

THE COURT: This two-page document that has just been testified to by this witness -- is there any objection to this document?

(NO RESPONSE)

8 THE COURT: There being no objection, let it be marked.

10 (EXHIBIT 3, PROJECTED INCOME, EXPENSES AND RETIREMENT
11 BALANCE OF JO CAROL ALFORD, MARKED AND RECEIVED INTO
12 EVIDENCE)

...

THE COURT: Counsel, you're arguing a very sympathetic argument, but it ultimately comes down to the authority and power of a Chancery Court in Madison County, State of Mississippi . . . . You're asking me to, as a court of first impression, apply

Tennessee and New Jersey like proceedings and assert a federal statute in a state court. I do not believe that is what the court order of what you are citing was meant to be.

...

COURT'S RULING

...

MR. MORTON: . . . does the Court also intend that that order of transfer of support to also be an increase in the Community Spouse Resource Allowance?

THE COURT: No, sir. I am not vested with the authority to grant such authority to Mrs. Alford. If you wish to appeal my decision, I certainly welcome the chance for anyone to make new law in the State of Mississippi, and it is nothing that would be more welcome than to learn some new law.

...

Centers for Medicare & Medicaid Services
Spousal Impoverishment

(Section 1924 of the Social Security Act; U.S. Code Reference 42 U.S.C. 1396r-5)

The expense of nursing home care, which ranges from $4,000 to $6,000 a month or more, can rapidly deplete the lifetime savings of elderly couples. In 1988, Congress enacted provisions to prevent what has come to be called "spousal impoverishment," which can leave the spouse who is still living at home in the community with little or no income or resources. These provisions help ensure that this situation will not occur and that community spouses are able to live out their lives with independence and dignity.

Resource Eligibility

The spousal impoverishment provisions apply when one member of a couple enters a nursing facility or other medical institution and is expected to remain there for at least 30 days. When the couple applies for Medicaid, an assessment of their resources is made. The couple's resources, regardless of ownership, are combined. The couple's home, household goods, an automobile, and burial funds are not included in the couple's combined resources. The result is the couple's combined countable resources. This amount is then used to determine the Spousal Share, which is one-half of the couple's combined resources. To determine whether the spouse residing in a medical facility meets the state's resource standard for Medicaid, the following procedure is used: From the couple's combined countable resources, a Protected Resource Amount (PRA) is subtracted. The PRA is the greatest of:

- The Spousal Share, up to a maximum of $109,560

in 2009;

• The state spousal resource standard, which a state can set at any amount between $21,912 and $109,560 in 2009;

• An amount transferred to the community spouse for her/his support as directed by a court order; or

• An amount designated by a state hearing officer to raise the community spouse's protected resources up to the minimum monthly maintenance needs standard . . . .

MEDICAID ELIGIBILITY MANUAL
REVISED 07-01-99
SECTION I
PAGE 9210
BASICS IN RESOURCE COMPUTATION
INSTITUTIONALIZATION
SPOUSAL IMPOVERISHMENT

In order to determine spousal shares of resources owned by an *IS/CS*, determine the couple's countable resources in the month of institutionalization. The first month the IS enters LTC, compute resources as follows:

To determine resource eligibility for an IS with a CS, Combine the value of all countable resources belonging to the IS and/or CS whether owned separately by each spouse or jointly by both spouses. Countable resources include all resources that are counted under ongoing liberalized resource policy. If a CS or IS own resources jointly with another person or persons, count the proportionate share of the IS or CS ownership interest per ongoing policy for the type of resource involved. The couple must provide complete resource verification of all countable resources owned as of the month the IS entered LTC. Verify resources per ongoing policy for the type of resource owned. Failure by the CS to verify resources owned by the CS will result in a Medicaid denial for the IS. The CS share of total countable resources is the maximum allowed under federal law . In order for a CS to receive a share larger than the federal maximum, a court order would be required granting the CS a greater share of total resources after Medicaid has made a decision regarding spousal shares . . . .